

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	No. 62254-4-I
)	
Respondent,)	DIVISION ONE
)	
v.)	
)	
ELMER AGUILAR-RIVAS,)	UNPUBLISHED
)	
Appellant.)	FILED: <u>July 20, 2009</u>
)	
)	

Cox, J. — Elmer Aguilar-Rivas challenges the trial court's denial of his request to give the jury a unanimity instruction. Because we conclude that the alleged acts constitute a continuing course of conduct to commit the crime charged, no unanimity instruction was required. We affirm.

In July 2007, King County Superior Court issued a no-contact order, prohibiting Elmer Aguilar-Rivas from having contact with Veronica Meza. The no-contact order advised Aguilar-Rivas he could be arrested and prosecuted even if Meza invited or allowed him to violate the order's prohibitions. On December 23, 2007, Meza and two of her girl friends went to Club Evolution. When Meza saw Aguilar-Rivas at the club hugging another woman, she approached him and told him their relationship was over. At that time, the no-contact order was still in effect.

Aguilar-Rivas grabbed Meza around the waist and refused her repeated requests to let her go. Meza then asked her friend to call club security, and when security approached, Aguilar-Rivas released her.

Right after Aguilar-Rivas released Meza, she and her friends decided to leave the club and they asked for a security escort to their car. As they exited the club with the escort, Meza saw Aguilar-Rivas walking up behind them. Aguilar-Rivas approached Meza's group, and he and the security escort exchanged words, resulting in a fight between the two men. Off-duty King County Sheriff's deputies working at the club responded to the scene within seconds. After interviewing Meza, deputies arrested Aguilar-Rivas for violating the no-contact order. Meza testified that she saw Aguilar-Rivas mouthing words to her when he was placed in the patrol car.

The State charged Aguilar-Rivas with one count of Domestic Violence Felony Violation of a Court Order. Prior to this charge, Aguilar-Rivas had been convicted twice of violating a no-contact order.

At trial, defense counsel requested the court give a unanimity instruction to the jury but did not provide a proposed instruction. The court did not give such an instruction. The jury convicted Aguilar-Rivas as charged.

Aguilar-Rivas appeals.

Jury Unanimity Instruction

Aguilar-Rivas argues the trial court erred by refusing to give the unanimity instruction requested by defense counsel. We disagree.

A defendant has a constitutional right to be convicted by a jury that unanimously agrees that the crime charged has been committed.¹ A unanimity instruction is not required, however, where the State presents evidence of multiple acts that indicate a “continuing course of conduct.”² To determine whether criminal conduct constitutes one continuing act, this court reviews the facts in a commonsense manner.³ We review alleged errors of law in jury instructions de novo.⁴

In State v. Handran,⁵ our supreme court considered whether the defendant’s multiple acts of assault, which took place at different times, constituted a continuing course of conduct. In that case, Handran entered his ex-wife’s apartment through a window and attempted to have sexual relations with her.⁶ The ex-wife awoke to find Handran leaning over her, nude, and kissing her.⁷ She demanded that Handran leave but, instead, Handran pinned her down and at some point hit her in the face.⁸ The State charged Handran with first degree burglary with assault as the underlying crime.⁹ The court did not give a unanimity instruction, and the jury convicted Handran as charged.¹⁰ On appeal, Handran argued that the jury could have found the underlying assault occurred

¹ State v. Petrich, 101 Wn.2d 566, 569, 683 P.2d 173 (1984).

² State v. Handran, 113 Wn.2d 11, 17, 775 P.2d 453 (1989) (quoting Petrich, 101 Wn.2d at 571).

³ Id.

⁴ State v. Barnes, 153 Wn.2d 378, 382, 103 P.3d 1219 (2005).

⁵ 113 Wn.2d 11, 17, 775 P.2d 453 (1989).

⁶ Id. at 12.

⁷ Id.

⁸ Id.

⁹ Id. at 13.

¹⁰ Id.

when he kissed her or when he hit her, thus, the jury should have been instructed to reach a unanimous decision on which act constituted the underlying assault.¹¹ Our supreme court disagreed, reasoning that Handran's conduct, which occurred in one place, during a short period of time, and involved the same aggressor and victim, constituted a continuing course of conduct.¹²

Here, after a commonsense evaluation of the facts in this case, we likewise conclude that Aguilar-Rivas's acts constituted a continuing course of conduct. The record indicates that both of Aguilar-Rivas's acts — holding onto Meza, following closely behind her, and mouthing words to her — took place within a short period of time, inside and outside the same club. Moreover, testimony established that Aguilar-Rivas followed Meza shortly after he made contact with her inside the club. The acts involved the same aggressor and victim and demonstrate Aguilar-Rivas's intent to have continued contact with Meza. Because Aguilar-Rivas's acts were part of a continuing course of conduct, no unanimity instruction was required in this case.

In State v. Spencer,¹³ we recognized the legislature's intent that violation of a no-contact order qualify as a continuing offense.¹⁴ We concluded that "[a]s long as the defendant remains within the prohibited zone, he continues to violate the no-contact order."¹⁵ Here, we note that it appears from testimony describing the club's premises, the contacts with Meza, and the sequence of events that

¹¹ Id. at 17.

¹² Id.

¹³ 128 Wn. App. 132, 114, P.3d 1222 (2005).

¹⁴ Id. at 137.

¹⁵ Id. at 137-38.

Aguilar-Rivas likely remained within 500 feet of Meza once he made contact with her in the club until he was placed in the patrol car. This is further support for our conclusion that Aguilar-Rivas's acts were part of one continuing crime.

Aguilar-Rivas argues that his acts cannot be viewed as a continuing course of conduct because they occurred in different places, were initiated by different people, were separated in time and a break in physical contact, and were discussed by different witnesses. The record shows that Meza and her friends left the club right after Aguilar-Rivas let her go. Based on multiple witnesses' testimony, it is reasonable to conclude that Aguilar-Rivas followed Meza right after the first contact. Moreover, the acts took place in close proximity. Although distinct, a commonsense view of the facts requires the conclusion that Aguilar-Rivas's acts were continuous conduct with the purpose of making contact with Meza. We also note that the no-contact order gave Aguilar-Rivas notice that any contact, regardless of who initiated it, could form the basis for a violation of the no-contact order. Finally, that the State used multiple witnesses to make its case in chief has no relevance to our analysis here.

Aguilar-Rivas next argues that the State's position that his acts were a continuing course of conduct is inconsistent with the prosecutor's closing argument. But we do not see any inconsistency. In closing, the prosecutor stated:

[Aguilar-Rivas] wanted to have the contact inside the club. [Meza] tried to get away, but he wanted it to continue. And it had stopped for a moment. Veronica was making her way out the door,

but the defendant wasn't satisfied with that, and he went up to her and wanted to continue this contact.^[16]

As we have already stated, the fact that there was a brief break in the physical contact between Aguilar-Rivas and Meza is not significant to our analysis. Thus, the prosecutor's acknowledgment of this break is not significant. Similarly, there is nothing inconsistent about the prosecutor's reliance on Aguilar-Rivas's actions both inside and outside the club with a continuing course of conduct theory. Contrary to Aguilar-Rivas's contention, the doctrine of judicial estoppel has no application here.

Based on our resolution of this case, we need not address Aguilar-Rivas's harmless error arguments or his claim of ineffective assistance of counsel.

We affirm the judgment and sentence.

Cox, J.

WE CONCUR:

Leach, J.

Becker, J.

¹⁶ Report of Proceedings (June 23, 2008) at 18-19.